## PUBLIC PROSECUTOR v. RAMACHANDRAN

[A.Cr.J. (Yong J.) November 12, 1973]

**[Kuala Lumpur — Selangor Criminal Appeal No. 106 of 1973]**

*Criminal Law and Procedure — Sentence — Driving motor lorry without due care and attention — Inadequate sentence — Road Traffic Ordinance 1958, s. 36(1).*

This was an appeal by the Public Prosecutor against sentence. The respondent had been convicted for driving his lorry without due care and attention, an offence under section 36(1) of the Road Traffic Ordinance, 1958 and had been fined $40.

**Held:** in the circumstances, the fine imposed was manifestly inadequate and wrong and the sentence must be enhanced to a fine of $250.

*Cases referred to:-*

(1) *Yong Pak Yong* v. *Public Prosecutor* [1959] M.L.J. 176.

(2) *Abdul Rahman bin Ibrahim* v. *Public Prosecutor* [1938] M.L.J. 219.

(3) *Liow Chow & Anor.* v. *Public Prosecutor* [1939] M.L.J. 170.

(4) *Deputy Public Prosecutor* v. *Isaac Elion* [1949] M.L.J. 160.

(5) *Abu Bakar bin Alif* v. *R.* [1953] M.L.J. 19.

(6) *R.* v. *Ball* 35 Cr. App. Rep. 164.

CRIMINAL APPEAL.

*Yaccob bin Ismail* (Deputy Public Prosecutor) for the appellant.

Respondent in person.

**Yong J.:** This is an appeal by the Public Prosecutor against the sentence passed by the magistrate on the ground that it was inadequate.

The accused was convicted for driving his motor lorry without due care and attention, an offence punishable under section 36(1) of the Road Traffic Ordinance 1958 with imprisonment not exceeding six months or with fine not exceeding one thousand dollars. The offence took place at Jalan Pantai Baru, a busy thoroughfare, leading to the Federal Highway and the University of Malaya, Kuala Lumpur. The accused drove his lorry into the back of a car which in consequence was extensively damaged. The magistrate fined him $40. This sentence is manifestly inadequate. This tiny fine will not deter the accused from repeating his offence nor will it deter others from committing it. Such a fine will not serve the public interest.

It is a notorious fact well known to every motorist travelling along Jalan Pantai Baru that lorries there do travel at great speed and frequently are not able to pull up in time to avoid running into the back of the preceding motor vehicle. In assessing sentence I think an appellate court is entitled to take judicial notice of this notorious fact. In *Yong Pak Yong* v. *Public Prosecutor*[1] Good J. said: —

"In dealing with a matter of sentence as distinct from considering whether a person ought to be convicted or not of the offence, I think that the courts are entitled to take judicial notice of what is notorious, of what everybody knows."

The general principles upon which an appellate court will follow in considering the reduction or enhancement of a sentence passed by the courts below are also well known. In *Abdul Rahman bin Ibrahim* v. *Public Prosecutor*[2] it was held that in suitable cases the Court of Appeal will reduce or enhance sentences when, having before them all the material which the trial judge had before him, they consider, having regard to all the circumstances of the case, that the sentence imposed is manifestly excessive or inadequate.

Then again in *Liow Chow & Anor.* v. *Public Prosecutor*[3] the Court of Appeal held that: —

"The sentence of the court of the first instance should not be altered unless the appellate court considers the sentence uniust. An appellate court must reject 'the lore of nicely calculated less or more' in matters of sentence. Before the sentence is altered it must be manifestly wrong, wrong either in the sense of being illegal or of being unsuitable to the proved facts and circumstances.

This court has at the present sitting substituted a sentence of nine months R.I. for a small fine in a case of serious assault; it also reduced a sentence of four years to one of two years because the one sentence was manifestly insufficient and the other manifestly excessive."

Gordon-Smith J. in *Deputy Public Prosecutor* v. *Isaac Elion*[4] said: —

"... before an appellate court interfered with the sentence of a court below, the appellate court had to be satisfied that the sentence must be shown to be wrong either in law or that it is manifestly excessive or inadequate on the facts and circumstances."

In *Abu Bakar bin Alif* v. *R.*[5] Spenser Wilkinson J. quoted with approval the following passage in the judgment in *R.* v. *Ball*: —[6]

"In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it."

Applying the aforesaid principles to the facts and circumstances of the case now before me I am satisfied that the small fine imposed by the learned magistrate is manifestly inadequate and wrong.

I hereby allow the appeal, and enhance the sentence to a fine of $250, in default imprisonment for one month. The accused's driving licence is to be endorsed accordingly.

*Appeal allowed.*

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## HII SOO CHIONG v. BOARD OF MANAGEMENT YEE TING PRIMARY SCHOOL

**[F.C. (Azmi L.P., Gill and Ali F.JJ.) November 21, 1973]**

**[Kuching — Federal Court Civil Appeal No. 9 of 1973]**

*Contract — Building contract — Claim for damages for breach of contract — Decision based on credibility of witnesses — Appellate court should not interfere with finding of trial court.*

In this case the respondents had brought an action for breach of a building contract, alleging that inferior materials had been used in construction. The learned trial judge, who heard the witnesses and decided questions of fact based on the credibility of the witnesses, held in favour of the respondents. The appellants appealed.

**Held:** as in this case the finding of facts by the trial judge were based on the credibility of the witnesses, the appellate court could not interfere with his decision and the appeal must be dismissed.

*Case referred to:-*

(1) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49.

FEDERAL COURT.

*Cheng Kweng Li* for the appellant.

*Wan Ullok* for the respondent.

**Azmi L.P.** (read by **Lee Hun Hoe Ag. C.J. (Borneo)**): The appellant, a building contractor, by an agreement in writing executed on 3rd November 1969 between him and the respondents, the Board of Management of the Yee Ting Primary School in Kanowit, Sarawak, undertook to build a school for the respondents for the sum of $21,950, according to the drawing and specifications attached to the agreement. The contractor in clause (2) of the agreement undertook to complete the building and hand it over to the respondents within six months from the date of the agreement, that is to say on or before 3rd May 1970, and if the contractor should fail to do so he had to pay damages for the delay at the rate of $200 per week. (See paragraph 30 of the "Specifications" attached to the agreement.)

The respondents in the statement of claim alleged that soon after they had taken over the building they discovered that certain materials used were either material different from the specifications or material different in dimensions from those specified in the agreement. They detailed in their statement of claim the amount of damages they claimed for each particular item. They also claimed liquidated damages amounting to $2,200 for the delay of 11 weeks in handing over the building and also for a sum of $2,302 which they say was an overdraft on bakau piling and grilles. The total sum claimed was $14,502.

The appellant denied that he was in any way in breach of the said agreement. As to the allegation that different materials or materials of different dimensions were used in the construction of the school appellant said as follows in his statement of defence:

"4. The defendant says that the substitution and alterations of the building materials as stated in paragraph 3 herein were all done and supervised by and under the instructions and directions of the plaintiffs' representative or agent. The plaintiffs are therefore estopped from claiming against the defendant for such substitutions and alterations.

5. Further and alternatively the defendant says that the school building was satisfactorily completed on the 28th June 1970. The agent or representative and supervisor of the plaintiffs' school and/or site supervisor appointed by the plaintiffs one Mr. Lee Ghin Cheng after examining and inspecting the said school building and the work done and materials used informed the defendant that the said school building had been satisfactorily completed."

The appellant also said that by a letter dated 15th November 1970 the respondents informed him that the date in which the school building was satisfactorily completed was 20th June 1970.

In view of the pleadings the learned trial judge proceeded to consider this matter by putting to himself the following three questions:—

(1) Whether or not Lee Ghin Cheng was the respondents' representative or agent,

(2) Whether or not Lee Ghin Cheng had authority to make substitutions or alterations to the building plan and materials without the consent or approval of the respondents' building sub-committee.

(3) Whether or not the respondents were estopped from claiming against the appellant for such substitutions and alterations.

The learned judge made certain findings of facts which to my mind were findings based on the credibility of witnesses. On the main and most important question whether Lee Ghin Cheng was appointed to supervise and also that as such he had the authority on his own to make alterations in the building plan and substitution of material to be used for the construction of the building, Mr. Lim Zean Khuan, the secretary of the Board of Management said that the committee had never appointed anyone at all to represent them and the committee never gave any authority to Lee Ghin Cheng to alter the building plan. It was true that whenever a resolution was passed by the sub-committee Lee was asked to convey the resolution to the contractor, the appellant. He also said that Lee never told him that he had agreed to the alterations requested by the contractor.

Mr. Chung Kim Hua, the Chairman of the Board of Management of the school said that any alteration to the plan must be approved by the sub-committee. He also said that Lee Ghin Cheng never told him or the sub-committee of the alterations and substitution made to the building materials.

On the other hand, there was Mr. Tan Cheng Sui the treasurer of the sub-committee who gave evidence on behalf of the appellant and stated that the sub-committee had appointed Lee Ghin Cheng to supervise the erection of the building because he had some experience in that kind of thing. As a supervisor he had therefore the authority to order or agree to requests for alterations. In fact during the course of the construction of the school, alterations were made from time to time by Mr. Lee when he found that the work was not satisfactory and all resolutions passed by the sub-committee would be conveyed to the contractor by Lee.

Mr. Lee Ghin Cheng himself gave evidence and said that he was the secretary of the board and was appointed the supervisor who according to him, was to run the business of the building sub-committee. He was the man who drew the plan. He expressed the view that when the work was completed on 27th June 1970 the work had been satisfactorily completed and he had the next day written to that effect to the Education Department at Kuching.

Before us counsel for the appellant pointed out to certain discrepancies in the evidence of the witnesses for the respondents and certain bits of evidence which would appear to contradict the judge's finding, in favour of the appellant. On this question I think it is relevant to refer to what Lord Diplock said when his Lordship was delivering the advice of the Privy Council in *Tan Chow Soo* v. *Ratna Amal*: [1]

"It is apparent from this summary of the evidence, which is analysed in detail in the careful judgment of the trial judge, Raja Azlan Shah J., that this was a classic example of a case in which the decision depends entirely upon which parts of the conflicting testimony of the witnesses who gave oral evidence before the learned judge at the trial, were to be believed. An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the

witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment."

And later at page 61 his Lordship said this:—

"In this kind of case it is very rarely that an appellate court is justified in reversing the decision of the trial judge who has had the opportunity of seeing and hearing the witnesses. . . ."

Another ground of appeal pointed out that the judge was wrong in concluding that the school building was handed over to the respondents on 21st September 1970 instead of on 28th June 1970. Here again the decision had to be made purely on the question of credibility of witnesses.

I do not propose to deal with the other grounds which in my view are also against finding of facts made by the judge on credibility of witnesses. I would therefore dismiss the appeal.

Since my brother judges sitting with me have concurred with my judgment, the appeal is therefore dismissed with costs. The deposit of $500 will be paid to the respondents on account of their taxed costs.

**Gill** and **Ali F.JJ.** concurred.

*Appeal dismissed.*

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## SONG TOH CHU v. CHAN KIAT NEO

**[F.C. (Azmi L.P., Gill and Ali F.JJ.) November 21, 1973]**
**[Kuching — Federal Court Civil Appeal No. 13 of 1973]**

*Contract — Building contract — Agreement for land to be developed and for it to be sold to developer — Sum paid "by way of deposit and in part payment of agreed purchase price" — Failure of purchaser to apply for subdivision of land and to carry out his part of the bargain — Whether vendor can apply for rescission of contract and for forfeiture of deposit.*

The respondent was the owner of a piece of land and she had entered into an agreement with the appellant whereby the major portion of the land was to be transferred to him and he was to develop the land. The appellant paid a sum of $20,000 "by way of deposit and in part payment of the agreed purchase price". The appellant failed to carry out his part of the bargain and he did not apply for subdivision of the land. The respondent then applied for a declaration for rescission of the agreement and for an order that the deposit of $20,000 be forfeited to her. The learned trial judge gave judgment in favour of the respondent and the appellant appealed.

**Held:** in the circumstances as the contract had failed by the default of the appellant, the respondent was entitled to retain the deposit.

*Case referred to:-*

(1) *Collins* v. *Stimson* 11 Q.B.D. 142 at p. 143.

FEDERAL COURT.

*Ee Poh Teck* for the appellant.

*Loke Yik Ping* for the respondent.

**Azmi L.P.** (read by **Lee Hun Hoe Ag. C.J. (Borneo)**): Madam Chan Kiat Neo was the owner of a piece of land in Kuching, Sarawak. It is about 1.66 acres in area. On 13th March 1969 she entered into an agreement with a building contractor named Song Toh Chu, and the relevant provisions of the agreement may be briefly stated as follows. She agreed that her land be sub-divided into 19 building lots. She was to retain 5 lots and the remaining 14 lots were to be transferred to the building contractor. These 14 lots were valued at $196,000. When the agreement was signed, Mr. Song deposited $20,000 with her "by way of deposit and in part payment of the agreed purchase price." As to the balance of the purchase price Mr. Song was to settle it by building 5 houses on her 5 lots, namely 3 double storey terrace houses on 3 lots and 2 double storey semi-detached houses on 2 lots. The transfer of the 14 lots to Song was, however, to be made in stages. For example, 2 lots were to be transferred when the reinforced columns on the ground floor of the 5 houses were completed, 2 more lots to be transferred when the reinforced columns on the top floor were completed and so on, until finally the remaining 4 lots would be transferred to Song when he delivered to her the said 5 houses, complete with fencing and sanitary installations. Time was, however, made of the essence of the agreement. Under clause 6 of the agreement Song was to apply within one month of the signing of the agreement to the Land and Survey Department of Kuching on behalf of Madam Chan for the sub-division of the land as agreed between them, and she undertook to sign any necessary papers for that purpose. Immediately after such approval had been obtained, then Song would submit and obtain approval of the relevant building plans, drawings, etc., from the Kuching Municipal Council. Within 12 months from the date of the approval, Song must deliver the 5 houses together with their certificates of fitness for occupation to Madam Chan.

The agreement also made provisions for breaches of the agreement by any of the parties. For example, under clause 18, if Song should fail to complete the 5 houses and deliver them to Madam Chan within 12 months from the approval of the plan as provided in clause 8, then Song shall pay interest on $176,000 at the rate of 6% per annum until the delivery of the houses to her.

Under clause 19, however, it is provided that "if for any reason (Mr. Song) fails to deliver the said houses to (Madam Chan) within the period of 10 months after the due date of completion of construction, then the deposit and/or any part payment of the said purchase price paid therein by (Mr. Song) shall be forfeited to Madam Chan as pre-estimated damages and thus this agreement shall *ipso facto* become null and void and thereafter Mr. Song shall not be entitled to claim against Madam Chan for the cost of construction work carried on by Mr. Song on the said land."

Under clause 20, however, if for any reason Madam Chan should fail to do her part in transferring the sub-divided lots to Mr. Song then she must return the deposit or any other payment she received from Mr. Song and for the cost of construction and in addition will also be liable for unliquidated damages. If, however, the Land and Survey Department should refuse to approve the sub-division then both parties agree to treat the agreement as null and void, in which event Madam Chan must pay back the deposit.

Mr. Song failed to carry out his part of the bargain. He did nothing as a matter of fact apart from paying the deposit of $20.000. He should in the first place apply on behalf of Madam Chan for the sub-division of the land under clause 6 of the agreement. He had not even done this. On 17th June 1970